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United States District Court
Central District of California

MUNCHKIN, INC.,

Case No. 2:13-cv-07228-ODW(AGRx)

Plaintiff,

V.

LUV N' CARE, LTD.; ADMAR
INTERNATIONAL, INC.,

ORDER RULING ON MOTIONS IN *LIMINE* [118, 120, 121, 122, 123, 126]

Defendants.

I. BACKGROUND

Plaintiff Munchkin, Inc. initiated this infringement action against Defendants Luv N' Care, Ltd. and Admar International, Inc. (collectively, "LNC" or "Defendants") on September 30, 2013. (Compl., ECF No.1.) U.S. Patent No. 6,292,962 (the '962 Patent) is directed to an infant blanket with teether/pacifier attached at the corners. On February 24, 2015, the Court held a hearing on several motions *in limine*. After considering the parties' arguments, the Court finds and concludes as follows.

II. LEGAL STANDARD

A motion *in limine* is “a procedural device to obtain an early and preliminary ruling on the admissibility of evidence.” *Goodman v. Las Vegas Metro. Police Dep’t*,

1 963 F. Supp. 2d 1036, 1046 (D. Nev. 2013). Trial courts have broad discretion when
 2 ruling on such motions. *See Jenkins v. Chrysler Motor Corp.*, 316 F.3d 664, 664 (7th
 3 Cir. 2002). Moreover, such rulings are provisional and “not binding on the trial
 4 judge” on the court. *Ohler v. United States*, 529 U.S. 753, 758 n. 3 (2000). “Denial
 5 of a motion *in limine* does not necessarily mean that all evidence contemplated by the
 6 motion will be admitted at trial. Denial merely means that without the context of trial,
 7 the court is unable to determine whether the evidence in question should be excluded.”
 8 *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp. 2d 844, 846 (N.D. Ohio 2004).

9 III. DISCUSSION

10 A. Plaintiff’s Motions *in Limine* [120, 121, 123]

11 1. To Exclude Expert Testimony and Reports by Edward Manzo [120]

12 Plaintiff argues that Defendants’ Expert, Edward Manzo’s testimony on
 13 invalidity is improper under Fed. R. Evid. 702. Mr. Manzo is a patent attorney and
 14 does not have the requisite technical background or experience to have specialized
 15 knowledge on the issues of invalidity in this case. Because Mr. Manzo does not
 16 qualify as an expert under Rule 702, he cannot provide any testimony as to invalidity
 17 of the ’962 Patent.

18 Mr. Manzo has an undergraduate degree in physics and no other technical
 19 experience in any field related to the ’962 Patent. Plaintiff argues that a person of
 20 ordinary skill in the art would have an engineering degree in a field such as
 21 Mechanical, Chemical, or Materials Science Engineering and a minimum of three
 22 years of experience in the design and/or manufacture of consumer products or a
 23 minimum of ten years of active industrial experience in the design and/or manufacture
 24 of consumer products. Throughout discovery, Defendants did not take a position on
 25 the proper level of skill in the art. Regardless, Mr. Manzo does not possess any
 26 technical experience to qualify as an expert under Rule 702.

27 Defendants argue that Mr. Manzo is an expert on Patent Office procedures and
 28 therefore is qualified to testify as to what the Patent Office Examiner would have

1 found if certain prior art references were before him. This type of testimony is just a
2 circuitous way to allow Mr. Manzo to testify about invalidity without being qualified
3 to do so. Further, since Mr. Manzo does not have the requisite technical background,
4 his testimony is purely irrelevant speculation.

5 Lastly, Mr. Manzo's Second Supplemental Report must be excluded because it
6 was untimely disclosed. The report was not served until January 14, 2015. The initial
7 expert disclosure deadline was October 6, 2014 and December 1, 2014 was the close
8 of discovery. Further, the Supplemental Report refers to late disclosed evidence of the
9 Disney Babies Bibs and Clown Bibs. This late-disclosed evidence was excluded by
10 the Court in a separate Order. (See ECF No. 148.) Therefore, the Court **GRANTS**
11 Plaintiff's Motion *in Limine* No. 1. (ECF No. 120.)

12 2. To Exclude Evidence, Testimony, or Argument Regarding Laches [121]

13 Plaintiff argues that Defendants have no witnesses to testify on laches.
14 Defendants' laches defense is not based on prior sales of the accused products in this
15 case, but rather two different products previously sold by LNC, the Precious Moment
16 Teething Blanket and Beatrix Potter Teething Blanket. Therefore, in order to pursue
17 the laches defense, Defendants must establish that those two products are
18 "substantially similar" to the accused products in this case such that Defendants'
19 activities are a continuous tort to which the defense of laches may be applied.

20 Defendants attempted to establish substantial similarity of the products through
21 their expert, Mr. Manzo, but that testimony was struck as untimely disclosed in the
22 Court's Order denying summary judgment. (See ECF No. 89.)

23 Defendants argue that LNC's CEO, Mr. Hakim is familiar with the previously
24 sold products as well as the accused products and therefore could speak to their
25 similarities as a lay witness. Mr. Hakim's testimony would not require any
26 infringement analysis because Defendants have already stipulated that the accused
27 products infringe the '962 Patent. (See ECF No. 116.) Because Mr. Hakim has
28 factual knowledge of the products, he is allowed to testify about the products and how

1 similar they are to one another without providing expert testimony on the issue of
 2 infringement. Therefore, the Court **DENIES** Plaintiff's Motion *in Limine* No. 2.
 3 (ECF No. 121.)

4 3. To Exclude Evidence or Argument on Late-Disclosed Invalidity Theories or
 5 Prior Art References [123]

6 Plaintiff argues that Defendants should be bound by their March 24, 2014
 7 Invalidity Contentions and should not be allowed to shift theories with new references
 8 that were untimely disclosed. On February 2, 2015, Defendants served Plaintiff with a
 9 Notice pursuant to 35 U.S.C. § 282 identifying over 40 prior art references Defendants
 10 either never previously disclosed or late-disclosed, including the Disney Babies Bibs
 11 and Clown Bibs.

12 Defendants argue they were just complying with § 282, which states that the
 13 party asserting invalidity must disclose information regarding any prior art references
 14 that they intend to rely upon for anticipation at least 30 days before trial.

15 Defendants' argument has no merit. First, § 282 only applies to anticipatory
 16 prior art, which Defendants never argue in their invalidity contentions or pretrial brief.
 17 Second, § 282 does not supersede the Federal Rules of Civil Procedure or the Patent
 18 Standing Order and Case Scheduling Order. *See ATD Corp. v. Lydall, Inc.*, 159 F.3d
 19 534, 550–51 (Fed. Cir. 1998). Section 282 sets a *minimum* period for the
 20 identification of prior art to be introduced as evidence of anticipation. Therefore, the
 21 Court **GRANTS** Plaintiff's Motion *in Limine* No. 3. (ECF No. 123.)

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 23 **B. Defendants' Motions *in Limine* [118, 122, 126]**

24 1. To Exclude Evidence of Willful Infringement in the Context of Invalidity
 25 [118]

26 Defendants argue that evidence of willful infringement during their invalidity
 27 case is prejudicial. Defendants have requested bifurcation of the case to separate
 28 invalidity from damages.

1 In light of the Court's ruling above to exclude testimony from Defendants' 2 Expert, Mr. Manzo, and the Courts Order excluding expert testimony by Mr. Hakim 3 (ECF No. 147), Defendants no longer have an invalidity case to present. If the trial 4 moves forward, the only issues will be willful infringement, laches, and damages. 5 Bifurcation is no longer relevant. Therefore, Defendants' Motion *in Limine* No. 1 is 6 **MOOT**. (ECF No. 118.)

7 2. To Exclude Any Evidence or Argument that Munckin Complied with the
8 Patent Marking Requirement of 35 U.S.C. § 287(a) [122]

9 Relevant to damages, 35 USC § 287(a) requires a patentee to either: (1) mark 10 substantially all of the patented goods sold by the patentee with the patent number or 11 (2) provide an Infringement Notice to the accused party. Defendants argue that (1) 12 Munchkin failed to plead compliance of 35 USC § 287(a); (2) Munckin's discovery 13 responses admit the absences of adequate evidence regarding patent marking; and (3) 14 Munchkin admits that any patent marking was on the packaging, rather than the 15 product itself.

16 Defendants' own evidence to support their motion shows that Plaintiffs have 17 evidence of marking. The deposition testimony of Steve Dunn describes Munchkin's 18 marking procedures and Defendants' own exhibit shows that the products are capable 19 of being marked on their tags and not just the packaging. Regardless, any deficiency 20 in marking can be weighed by the jury to determine the appropriate damages amount. 21 Lastly, Defendants' arguments regarding insufficient pleadings are irrelevant at this 22 stage of the case. Therefore, the Court **DENIES** Defendants' Motion *in Limine* No. 2. 23 (ECF No. 122.)

24 3. To Exclude the Expert Testimony of Daniel Wetzel at Trial [126]

25 Defendants argue that Plaintiff's damages expert, Mr. Wetzel's testimony is 26 inadmissible for failure to properly apply the methodology for determining a 27 reasonable royalty. Specifically, Mr. Wetzel admitted during his deposition that he 28

1 failed to place the parties' hypothetical royalty negotiation at either the date the patent
2 was issued or when LNC first began selling the accused products.

3 Plaintiff argues that the dispute concerning timing is an issue for the jury, and
4 any concerns can be addressed on cross-examination. The Court agrees. Further, Mr.
5 Wetzel's report specifies that he accounted for the hypothetical-negotiation taking
6 place between the parties at the time of infringement. Ultimately these issues go to
7 the weight of the evidence and not admissibility. Therefore, the Court **DENIES**
8 Defendants' Motion *in Limine* No. 3. (ECF No. 126.)

9 **IV. CONCLUSION**

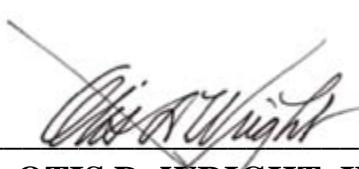
10 For the foregoing reasons, the Court adopts the rulings set forth above. In light
11 of these rulings and as expressed during the hearing, the Court orders the parties to
12 conduct a settlement hearing before trial with either Magistrate Judge Rosenberg or
13 another third party. The parties will notify the Court when a settlement hearing is
14 scheduled as well as file a joint status of settlement describing the outcome of that
15 hearing.

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17 **IT IS SO ORDERED.**

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19 February 26, 2015

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22 **OTIS D. WRIGHT, II**
23 **UNITED STATES DISTRICT JUDGE**

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